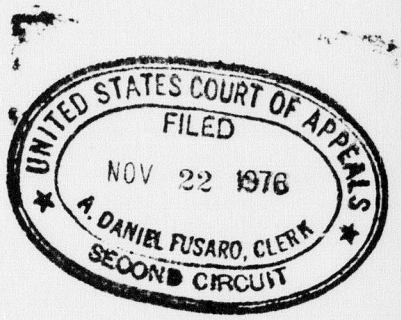
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6176



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCISCO BANARIA, LUZUIMINDA BANARIA, and RIEL BANARIA,

Plaintiffs-Appellants,

- against -

BENEDICT FERRO, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

Docket No. 76-6176

B P/S

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCISCO BANARIA,
LUZUIMINDA BANARIA and
RIEL BANARIA,

Plaintiffs - Appellants,

v.

Docket No.
76-6176

BENEDICT FERRO,
DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant - Appellee.

ISSUES PRESENTED

WHETHER THE DISTRICT COURT HAS ORIGINAL JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION?

WHETHER A PRELIMINARY INJUNCTION SHOULD HAVE ISSUED BARRING DEPORTATION OF APPELLANTS PENDING A FINAL DETERMINATION ON THE MERITS IN THE DISTRICT COURT?

STATEMENT OF THE CASE

On September 1, 1976, appellants filed an action in the United States District Court for the Northern District of New York seeking declaratory relief, the review of administrative action and injunctive relief pursuant to 28 U.S.C. 2201, 5 U.S.C. 704 et seq, and Fed. R. Civ. Pro. 65(a), respectively. (A20).

The complaint sought to review appellee's denial of appellant LUZUIMINDA BANARIA's application for reinstatement of her 'H' status (8 U.S.C. 1258), and a declaration that the Immigration and Naturalization Services' ("Service") revocation of Operations Instructions Section 242.10 (a)(6)(i) was void as contrary to the rule-making procedure embodied in 5 U.S.C. 553 et. seq. (A-22,24).

On September 20, 1976 the District Court, upon motion of the appellants entered a temporary restraining order staying all proceedings to effectuate their deportation pending a final determination on the merits.(A-31).

On October 18, 1976, oral argument was heard on appellants' motion for a preliminary injunction.

Finally, on October 21, 1976, Chief Judge James T.Foley issued a memorandum decision and order denying and dismissing

appellants' motion for a preliminary injunction. (A-59).

The instant appeal was filed with this Court on October 27, 1976 and, upon motion of the appellants, this Court granted a stay of the order below pending this appeal.

STATEMENT OF FACTS

LUZUIMINDA BANARIA entered the United States on an 'H' visa as a registered nurse on or about May 29, 1972 and was aurhotized to remain in the United States until May 30, 1975.

From the time of her entry to the present, Mrs. Banaria has been employed as a registered nurse and has been in substantial compliance with the terms and conditions of her entry.

On August 2, 1972, Mrs. Banaria filed a third preference visa petition pursuant to 8 U.S.C. 1153(a)(3) on the basis of her profession, that of a registered nurse. Said visa petition was subsequently approved by the Service (A-49) and in May 1976 Mrs. Banaria requested a grant of indefinite voluntary departure under Operations and Instruction 242.10(a)(6). This request was denied by the defendant on June 1, 1976.(A-50).

On March 21, 1975, immediately prior to the date when a renewal of her 'H' visa was required, Mrs. Banaria gave birth to a child and due to complications surrounding the birth of this child failed to file a visa extension application with the Service. (A-45).

Subsequently, on April 29, 1975 the Service approved an 'H' visa petition filed on Mrs. Banaria's behalf by St. Clare's Hospital of Schenectady, New York. (A-48).

Notwithstanding the pendency of the aforementioned visa petition, the Service issued an Order to Show Cause placing Mrs. Banaria, her husband and son under deportation proceedings. (A-51, 52).

Prior to a hearing on the issue of deportability Mrs. Banaria applied to be placed back into 'H' status nunc pro tunc and this application was arbitrarily denied by the District Director. (A-45).

However, it appears that the District Director failed to properly consider the grounds for Mrs. Banaria's delay in filing for an extension of her status, to wit, the serious complications surrounding the birth of her son, Randy Banaria, in March 1975. It was necessary for Mrs. Banaria to spend

months at home nursing and caring for this child's calcium deficiency and the added pressure of this situation was the reason for her technical and insubstantial breach of the filing requirements mentioned above.

At a hearing before an Immigration Judge held on June 7, 1976, Mrs. Banaria and her family were ordered deported from the United States but were granted the privilege of voluntary departure to September 7, 1976. (A-15,16,19).

SUMMARY OF ARGUMENT

The District Court erred in holding that it had no jurisdiction to review appellants' cause. This action was instituted in the District specifically because the Court of Appeals had no jurisdiction under the provisions of 8 U.S.C.1105(a). Therefore, the District Court was the proper forum for this action to review an arbitrary decision of the District Director which was not entered in or associated with a deportation proceeding.

A preliminary injunction should have issued in the court below pending a final determination on the merits of this action as the failure to issue same would result in irreparable harm to the appellants in the form of their forced deportation from the United States.

POINT I

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A PRELIMINARY INJUNCTION FOR LACK OF JURISDICTION.

A. THE DISTRICT COURT IS THE PROPER FORUM FOR THIS ACTION.

This action was properly brought in the District Court to review the District Director's denial of Mrs. Banaria's application for reinstatement of her 'H' status inasmuch as the Court of Appeals was without jurisdiction pursuant to the statutory limitation contained in 8 U.S.C. 1105(a).

As stated by the Supreme Court in Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S.206 (1968):

> "(t)hese procedures (106(a)) vest into the courts of appeals exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of 106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." at 209-210.

The Court went on to narrow its holding by saying:

> "We hold that the judicial review provisions of 106(a) embrace only

those determinations made during a proceeding conducted under 242(b), including those determinations made to reopen such proceedings." Id., at 216.

There is no question here that the order of the District Director of which review was sought was not intimately connected nor immediately associated with a deportation proceeding. Lad v. Immigration and Naturalization Service, 539 F.2d 808 (1st Cir. 1976); Yan Wo Cheng v. Rinaldi, 389 F.Supp.583 (D.N.J. 1975).

Mrs. Banaria's application for the reinstatement of her'H' status was made on April 6, 1976, prior to the holding of a deportation proceeding on June 7, 1976. Further, this application could not be made in deportation proceedings, nor reviewed in deportation proceedings wherein the Immigration Judge's jurisdiction is limited by statute and regulation to issues of deportability (See 8U.S.C. 1252,1254,1255,1259 and 8 CFR 242.8) and does not include determinations associated with non-immigrant status which are within the jurisdiction of the District Director under authority delegated through the Regional Commissioner. see 8CFR 103.1(m); see 8CFR 103.1(m)(11).

Specifically, the 'H' classification is a non-immigrant status defined in 8U.S.C. 1101(a)(15)(H) and is accorded to an

alien "having a residence in a foreign country which he has no intention of abandoning" and is either of distinguished merit and ability or coming to the United States to perform temporary services where labor is otherwise unavailable in this country to perform those services. As a non-immigrant classification, the issue of Mrs. Banaria's 'H' status is wholly outside the deportation proceeding held below.

Nevertheless, in his opinion below, Judge Foley cited Colato v. Immigration and Naturalization Service, 531 F.2d 678 (2d Cir. 1976) and held that the instant case came within the holding of this Court in that case. (A-64). In so doing, Judge Foley quoted a portion of the opinion's final paragraph of this Court's decision in Colato, supra, to wit,

> "the denial of discretionary relief is so intimately connected with a deportation proceeding that the two should be heard together in direct review by the Court of Appeals."

Unfortunately, Judge Foley inadvertently omitted the following critical language which preceded the quotation and properly established the context of said quotation, to wit,

> "Unlike Giova or Foti, this is not a case in which...." (emphasis added)

Despite Judge Foley's holding to the contrary, the holding of this Court in Colato fully sustains the position taken by the appellants. In fact, the instant case is precisely the type contemplated in the Giova and Foti cases, which were further clarified in Cheng Fan Kwok, supra. see Giova v. Rosenberg, 379 U.S.18 (1965) and Foti v. Immigration and Naturalization Service, 375 U.S.217 (1963).

Thus, it appears that the Court below failed to properly apply the case law pertaining to the jurisdictional question involved in this action, and precluded the appellants from obtaining a full review of the facts of this case which would otherwise establish the District Director's abuse of discretion.

B. APPELLANT HAD EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES PRIOR TO BRINGING SUIT IN DISTRICT COURT.

In his decision denying the Banarias' motion for a preliminary injunction, Judge Foley stated that the plaintiffs were on notice that a deportation hearing would be held on the issue of the District Director's denial of Mrs. Banaria's reinstatement application, and that on this issue "that plaintiffs, I believe,

should have filed an appeal to the Board of Immigration Appeals under the regulations (see 8 CFR 242.21)." (A-65). Judge Foley went on to conclude that a failure to take said appeal constituted a failure to exhaust administrative remedies and thus barred judicial review.

The error in Judge Foley's holding lies in the fact that the Board of Immigration Appeals has a carefully defined and limited appellate function. The Board's jurisdiction is spelled out specifically in 8 CFR 3.1(b) (1)-(B). A plain reading of these sections indicate that none of them contain language which would bring the District Director's denial of Mrs. Banaria's application for 'H' status reinstatement within the purview of the Board's appellate jurisdiction as the statute under which Mrs. Banaria made her application was 8 U.S.C. 1105(a)(15)(H).

Therefore, the Banarias' exhausted their administrative remedies and had no alternative but to institute this action in the District Court as there was no other possible agency review available to them where the Board of Immigration Appeals was without the specific statutory authority to hear any appeal of the District Director's action in this matter.

POINT II

A PRELIMINARY INJUNCTION SHOULD ISSUE PENDING A FINAL DETERMINATION ON THE MERITS OF THIS ACTION.

A preliminary injunction will issue:

> "only upon a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

Triebwasser & Katz v. American Telephone and Telegraph Co., 535 F. 2d 1356, 1368 (2d Cir. 1976), citing Sonesta International Hotels, v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973).

Judge Foley stated in his opinion below that there was,

> "... no need to belabor the irreparable injury or balance of hardship factors because there is little doubt that the severity of deportation to plaintiffs, as always in these situations, entails both." (A-(61)

Certainly appellants could not state this more eloquently and succinctly, and on the basis of this statement alone, appellants are tempted to rest on the question of the issuance

of a preliminary injunction.

However, Judge Foley's denial of injunctive relief on jurisdictional grounds clearly raises the question as to the appropriateness of such relief should jurisdiction be found here and this action remanded to the District Court for further proceedings.

Appellants contend that, as developed in Point I,

(1) The Immigration Judge had no jurisdiction to pass upon the propriety of the action of the District Director in refusing to excuse Mrs. Banaria's filing her application to renew her 'H' non-immigrant status out of time.

(2) The Immigration Judge had no jurisdiction to pass upon the propriety of the revocation of its outstanding operations instruction by the Service without following the statutory notice of rule-making procedure.

(3) The Board of Immigration Appeals had no jurisdiction to pass upon or review either or both of the actions of the District

Director or the Immigration and Naturalization Service.

(4) The Banarias had exhausted their administrative remedies before they commenced their action in the District Court below.

(5) The District Court had original subject matter jurisdiction of this action, and the Banarias properly sought the jurisdiction of that Court.

Further, there was no evidentiary hearing before the Court below, nor were there motions or cross-motions for summary judgment whereby the facts involved could have been developed in detail.

In the event that this cause is remanded to the District Court, as counsel for the plaintiffs feel should be done, plaintiffs would move for summary judgment. They would present evidentiary affidavits in support of the motion, in order to establish that the actions of the District Director were arbitrary and capricious, and that Mrs. Banaria's pregnancy

and post-birth complications involving her child were sufficient to excuse the late filing of her application.

The summary refusal of Chief Judge Foley, in denying injunctive relief, to recognize that his Court had original subject matter jurisdiction of this action prevented adequate consideration of the facts in the case, as would have been developed if Chief Judge Foley had acknowledged jurisdiction and had granted the application for a temporary injunction. Thereby this reviewing Court has been deprived of the opportunity of reviewing the facts which would have had a direct bearing upon whether there was abuse of discretion by the District Director, and whether he was arbitrary and capricious in his decision.

Appellants urge that there is "probable success" in their action.

CONCLUSION

The appellants respectfully urge and submit that:

(1) This Court should find that the District Court below had original subject matter

CERTIFICATE OF SERVICE BY MAIL

I, EDWARD L. DUBROFF, do hereby certify that, on this 22nd day of November, 1976, I did cause to be served upon:

RICHARD K. HUGHES, Esq.
Assistant U.S. Attorney
Attorney for Defendant-Appellee
Federal P. O. Building
Albany, New York 12207

two copies of the Appellants' Brief, and one copy of the Joint Appendix, herein, by depositing the same with the United States Postal Service in a prepaid mailing envelope.

Edward L. Dubroff

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jurisdiction of the action.

(2) This cause should be remanded to the District Court below for appropriate and further consideration of the issues raised therein.

(3) This Court should continue a stay of the proposed deportation of the appellants by the appellee pending a final determination of the issues in this action.

Respectfully submitted,
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By: _____
EDWARD L. DUBROFF
of Counsel

Dated: New York, New York
November 22, 1976